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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1063

CHARLES WRIGHT, JIMMY CARTER, RUFUS HOOKS
ESTELLE JOHNSON and FRANCIS SPIRES,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioners Charles Wright, Rufus Hooks, Jimmy Carter, Estelle Johnson and Francis Spires, pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Illinois.

JUDGMENT AND OPINION OF THE COURTS BELOW

The judgment of the Circuit Court of Cook County, Criminal Division was entered on May 12, 1966, is not reported, but appears in the record filed with and certified by the Clerk of the Supreme Court of Illinois, and transmitted herewith.

The opinion of the Supreme Court of Illinois affirming said judgment was entered on November 22, 1968, is reported at —— Ill. 2d. ....., 242 NE. 2d. 180, and is set forth in the Appendix attached hereto.

JURISDICTION

The opinion and judgment of the Supreme Court of Illinois was rendered on November 22, 1968.

This Court's jurisdiction is conferred by Title 28, Section 1257 (3), U.S.C.

QUESTIONS PRESENTED

1.

WHETHER, ASSUMING PROBABLE CAUSE, POLICE OFFICERS MAY FORCE ENTRY INTO A HOME IN THE NIGHTTIME WITHOUT A WARRANT IN ORDER TO MAKE AN ARREST FOR A MISDEMEANOR OF A NONVIOLENT NATURE.

2.

WHETHER THE POLICE WHO ACT PURSUANT TO AN INVALID SEARCH WARRANT MAY DELAY EXECUTION OF THE WARRANT AND SET UP A SURVEILLANCE IN ORDER TO ESTABLISH INDEPENDENT PROBABLE CAUSE FOR AN ARREST AND INCIDENTAL SEIZURE.

STATUTES INVOLVED

THE STATUTORY PROVISION INVOLVED IS THE ILLINOIS REVISED STATUTES, 1965, Chapter 38, Paragraph 121-3.

STATEMENT OF CASE

About 10:00 p.m. on the night of November 24, 1965, five police officers went to an address armed with a search warrant for the second floor. [This warrant was held to be invalid and is not in issue here]. However, the officers did not proceed forthwith to execute the command of the search warrant, but instead set up a surveillance of the premises.

The officer who testified on the Motion of Suppress stated that he observed numberous persons known to him as "policy runners"* enter the first floor of the premises. He then proceeded to the rear of the premises where he stood under the elevated train tracks within three feet of the rear window. At this vantage point, he heard a woman say: "Are all your books in? Who has any short books? Where is all the money?" Then he heard an adding machine. These expressions indicated to him that a gambling operation was going on, he said.

The police then knocked on the door, were refused admission, forced entry, arrested the defendants, and seized items later introduced, over objection, at petitioner's trial for gambling.

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*We do not further discuss the allegation that petitioners were "known" to the officers as "policy runners". Such an allegation is but "a bold and unilluminating assertion of suspicion that is entitled to no weight in appraising [probable cause]." *Spinelli* v. *United States*, —— U.S. .... decided January 27, 1969, #8.

REASON FOR GRANTING THE WRIT

1.

THE OPINION IN THE CASE AT BAR IS IN CONFLICT WITH NUMEROUS CASES DECIDED BY THIS COURT WHICH HOLD THAT THE POLICE MAY NOT FORCE ENTRY INTO A HOME WITHOUT A WARRANT, ABSENT EXIGENT CIRCUMSTANCES.

In the case at bar, the police forced entry into petitioner's home at 10:00 p.m. without a warrant, in order to make an arrest for gambling. The probable cause relied upon was that one of the officers stood within three feet of petitioner's window and had heard an adding machine and someone say: "Are all your books in? Who has any short books? Where is all the money?"

In *Jones* v. *United States,* 357 U.S. 493, this Court chose to by-pass the following issue:

> ". . . whether the forceful nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had commited a felony, under circumstances where no reason appears why an arrest warrant could not have been sought is consistent with the Fourth Amendment." [357 U.S. at 499-500].

We respectfully submit that this is the case, and this is the time for this Court to answer this important question.

The instant cause is directly in conflict with *McDonald* v. *United States,* 35 U.S. 451, where the officers looked through a transom, saw persons engaged in gambling and arrested them.

In language directly applicable to the case at bar, the Court said:

> "This is not a case where the officers, passing by on the street, hear a shot and a cry for help and demand entry in the name of the law.
>
> "Where, as here, officers are not responding to an emergency there must be compelling reasons to justify the absence of a search warrant [335 U.S. at 454].

This above principle, and the *McDonald* case, were cited approvingly just last term in *Katz* v. *United States,* 389 U.S. 347, footnote #19.**

It is no answer to say that in *McDonald* the officers invaded the privacy of the landlady in order to observe the activity through the transom, whereas here, the officers stood on public property, because the Court assumed in *McDonald* the government's "syllogism": that the officers were lawfully within the hallway, " as much so as if Mrs. Terry [The landlady] had admitted them" [355 U.S. at 454].

In *Johnson* v. *United States* 333 U.S. 10, this Court refused to allow the police to enter a home without a warrant though they smelled burning opium emanating from the room.

This Court specifically followed *Johnson* v. *United States,* 333 U.S. 10, in *Chapman* v. *United States,* 365

**Despite this Court's reliance upon no less than nine cases [*Katz* v. *United States,* 389 U.S. at 357, footnotes #18 and 19] for the proposition that "searches conducted . . . without prior approval by judge or magistrate are *per se* unreasonable under the Fourth Amendment, "— none of which involved 'electronic eavesdropping'—the Illinois Supreme Court still says ". . . we believe *Katz* is applicable only to those instances where electronic eavesdropping devices or other articifical means are employed in addition to the natural senses" 242 NE 2d 180, 183.

U.S. 610, even though the entry there was effectuated with the consent of the landlord.

Here, as in *McDonald* v. *United States,* 335 U.S. 351, *Johnson* v. *United States,* 333 U.S. 10, and *Chapman* v. *United States,* 365 U.S. 610:

> "No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to bypass the Constitutional requirement. No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with removal or destruction . . . [*Johnson* v. *United States,* 333 U.S. 10, 15, quoted in *Chapman* v. *United States,* 365 U.S. 610, 615.]

The Illinois Supreme Court's reliance on *Harris* v. *United States,* 390 U. S. 234 [240 N. E. 2d at 183] is completely misplaced. *Harris* involved a seizure of an item in plain view from a car over which the police had lawful control, whereas the instant case involved a nighttime forceable entry into a home without a warrant.

2.

THE ACTION OF THE POLICE IN DELAYING THE EXECUTION OF THE SEARCH WARRANT, WHEN IT BECAME EVIDENT THAT THE WARRANT WAS INVALID, IN ORDER TO SET UP A SURVEILLANCE OF THE PREMISES VITIATED THE SUBSEQUENT ARREST AND SEIZURE.

The police after obtaining a search warrant for the second floor of a certain address went to the premises. When they arrived, instead of executing the warrant they set up a surveillance, saw numerous persons enter the building, and then observed activity on the first floor. Without first attempting to obain a valid warrant they forced entry to the first floor.

Just last term this Court held that:

> "A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid." [*Bumper* v. *North Carolina,* 88 S. Ct. 1788, 1792].

Is it now the law that when the police go to private premises pursuant to a search warrant which in invalid, they may delay execution of the warrant, and peer into the windows of the premises in the night in order to obtain evidence upon which to justify an arrest so as to overcome the deficiences of the invalid warrant?

As in *Accarino* v. *United States,* 179 F. 2d 456, D.C. Cir., 1949, the police ". . . had ample time and opportunity to make the arrest(s) on the street." [179 F. 2d at 464] but they did not do so.

As in *McKnight* v. *United States,* 183 F. 2d 977, D.C. Cir., 1950, the officers delayed execution of the process

[here a search warrant, in *McKnight* an arrest] until they could use the arrest as a pretext for a search.

Interestingly, though advanced in Petitioner's brief before the Illinois Supreme Court, that Court simply did not face the issue of whether the police may delay the execution of a search warrant in order to make a surveillance of the premises in the hope of obtaining probable cause to make an arrest without a warrant.

CONCLUSION

We pray this Honorable Court grant its Writ of Certiorari.

Respectfully submitted,

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APPENDIX

Docket No. 40639—Agenda 13—September, 1968.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, *vs.*

CHARLES WRIGHT *et al.*, Appellants.

Mr. JUSTICE UNDERWOOD delivered the opinion of the court:

On May 12, 1966, the defendants were found guilty of gambling after a bench trial in the Cook County circuit court. The sentences imposed ranged from 3 months imprisonment and a $300 fine to one year's probation and a $100 fine. Defendants contend the evidence introduced against them in the trial court was illegally seized by police officers who, without consent or a valid search warrant, entered a private dwelling for the purpose of making an arrest.

The sole witness at defendant's trial was arresting officer Herman Waller, a Chicago policeman with 4 years experience, who testified he had made approximately 300 previous "policy" (a numbers game) arrests. On November 24, 1965, Waller secured a search warrant for the second floor apartment of a two-story frame building at 1702 North Bissell in Chicago. He and four other officers arrived outside the premises at about 9:30 P.M. and established a surveillance of the building because they were informed that the individuals involved in a policy operation there would not be in the second floor apartment until 10:00 or 10:30 P.M. During the surveillance Officer Waller observed persons who were allegedly engaged in the policy operation entering the first floor apartment rather than the second floor apartment. The officer testified that he recognized some of these people as "known policy runners"

whom he had arrested many times before, and after some 35 minutes spent in watching the front of the apartment building he proceeded to the rear of the premises to look into a window of the first floor apartment which was partially covered by curtains. Since the building did not have a back yard the officer was able to stand 1 to 3 feet from the rear window under the elevated tracks on the Chicago Transit Authority right-of-way. Through a crack in the window curtain Officer Waller testified that he could see the heads of the people inside, and through the closed window he could hear an adding machine being operated and a female voice inquiring: "Are all your books in? Who has any short books? Where is all the money?" From his extensive experience with policy gambling operations the officer knew that adding machines were commonly used to add up the sums of money collected, and he also knew that a "short book" referred to a situation where a runner does not have enough money to "clear" his bets on a particular book. After about ten minutes of watching and listening through this window, Officer Waller went to the front door of the apartment, knocked, announced his office, and forced his way in after the person coming to the door told him to "get lost." The officer then went directly to the kitchen in the rear of the apartment where he observed defendants Estelle Johnson, Francis Spires and a third defendant who is not a party to this appeal sitting at a table with an adding machine, policy writings and policy result slips thereon. Another defendant, Charles Wright, yelled "Police" and threw a bag containing $179.35 behind a washing machine. Defendants Rufus Hooks and Jimmy Carter were also in the kitchen and a search of them revealed they were carrying policy writing and money in their pockets. At this time Officer Waller testified defendants Wright, Carter and Hooks made var-

ious incriminating remarks to him. Defendant Wright asked him, "Well, why don't you go out and leave this policy alone." Defendant Clark stated, "Okay, you got me, let's go", and defendant Hooks remarked, "Well, you have finally got me."

The single question presented by the facts of this case is whether the trial court was correct in refusing to suppress the evidence thus secured, and resolution of this question depends upon whether the defendant's fourth amendment rights against unreasonable searches and seizures were violated. It is of no consequence that the search warrant obtained by police was quashed because it authorized a search only of the second floor apartment of the two-story building, since defects in a search warrant are immaterial if the search can be otherwise justified. (*People* v. *Washington,* Docket No. 40660; *People* v. *Williams,* 36 Ill. 2d 505, 509; *People* v. *Brinn,* 32 Ill. 2d 232, 241.) The test of the constitutionality of a search "is not whether it was reasonable or practicable for the officers to obtain a search warrant, but whether the search was unreasonable. It is well established that a search without a warrant is reasonable and valid if it is incident to a lawful arrest and there is no requirement that the arrest be under the authority of an arrest warant. (*Ker* v. *California,* 374 U.S. 23, 41, 83 S. Ct. 1623, 10 L. ed. 2d 726.) In turn, the validity of an arrest without a warrant depends upon whether the officers had reasonable cause to believe that an offense had been committed and that the defendant had committed it. (*People* v. *Jones,* 16 Ill. 2d 569, 573.). The test is not whether there is sufficient evidence to convict the arrested person, but probable cause exists for arrest where a reasonable and prudent man, having the knowledge possessed by the officer at the time of the arrest, would believe the defendant com-

mitted the offense. (*People* v. *Hightower,* 20 Ill. 2d 361, 366.) In deciding the question in a particular case, courts deal with probabilities and are not disposed to be unduly technical. (*People* v. *Fiorito,* 19 Ill. 2d 246, 256.)" *People* v. *Jones,* 31 Ill. 2d 240, 243-4.

In *Davis* v. *United States* (9th cir.), 327 F.2d 301, 305, the rule is stated that " 'It is well established that it is not a search to observe what is open and patent either in daylight or in artificial light. United States v. Lee, 274 U.S. 559, 47 S. Ct. 746, 71 L. Ed. 1202; Boyd v. United States, 4 Cir., 286 F. 930; Smith v. United States, 4 Cir., 2 F. 2d 715; Safarik v. United States, 8 Cir., 62 F. 2d 892, 895 * * *.' Petteway v. United States, 261 F. 2d 53, 54 (4th Cir. 1958). As was said by Judge Holtzoff in United States v. McDaniel, 154 F. Supp. 1, 2 (D.C. 1957), affirmed 255 F. 2d 896 (D.C. Cir., 1958) and cert. denied, 358 U.S. 853, 79 S. Ct. 82, 3 L. Ed. 2d 87 (1958), Williams v. United States, 363 U.S. 849, 80 S. Ct. 626, 4 L. Ed. 2d 1732 (1960), 'if, without a search and without an unlawful entry into the premises, a contraband article * * * is seen in the premises, the police are not required to close their eyes and need not walk out and leave the article where they saw it.' " (See *People v. Tate,* 38 Ill. 2d 184, 187; *State* v. *Carpenter,* 181 Neb. 639, 150 N.W. 2d 129, 134-5.) This plain view doctrine has been applied to anything which an officer becomes aware of by use of his five senses while in a lawful position. *Walker* v. *State* (Okl. Cr.), 270 P. 2d 1107; seee also *United States* v. *Shue* (4th cir.), 385 F. 2d 416.

As recently as *Harris* v. *United States,* 390 U.S. 234, 19 L. Ed. 2d 1067, 88 S. Ct. 992, 993, the United States Supreme Court reaffirmed the principle that "objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and

may be introduced in evidence. Ker v. State of California, 374 U.S. 23, 42-43, 83 S. Ct. 1623, 1634, 1635, 10 L. Ed. 2d 726 (1963); United States v. Lee, 274 U.S. 559, 47 S. Ct. 746, 71 L. Ed. 1202 (1927); Hester v. United States, 265 U.S. 57, 44 S. Ct. 445, 68 L. Ed. 898 (1924)." However, in *Katz* v. *United States,* 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507, a pre-*Harris* decision, the Supreme Court held that use of an electronic eavesdropping device to overhear one side of a telephone conversation in a public telephone booth was an unconstitutional search and seizure regardless of the fact that the device employed did not happen to penetrate the wall of the booth. The court there noted that the underpinnings of the "trespass" doctrine had been so eroded that it could no longer be regarded as controlling. We do not, however, read *Katz* as indicating any constitutional infirmity in the instant search, for we believe the seemingly restrictive ruling in *Katz* is applicable only to those instances where electronic eavesdropping devices or other artificial means are employed in addition to the natural senses. We read the reaffirmation of the lawful position aspect of the plain-view doctrine in *Harris* as retaining the viability of the trespass doctrine in those cases where law enforcement officers gain information concerning crimes by use of their natural senses. Therefore, while the absence of a trespass is no longer to be an adequate ground to justify the admission of evidence secured through use of the natural senses assisted by artifical means, the lack of a trespass is still a highly relevant consideration in sustaining the admission of evidence which has fallen into the plain view of an officer, *i.e.,* gathered solely by the use of his natural senses.

We have here a law enforcement officer using his senses of vision and hearing to discover what is occurring inside a private residence. In three Federal cases (*Brock* v.

United States (5th cir.), 223 F. 2d 681; *California* v. *Hurst* (9th cir.), 325 F. 2d 891; *Texas* v. *Gonzales* (5th cir.), 388 F. 2d 145) it was held that evidence procured by officers standing on the *defendants premises* and peering into their windows constituted a search in violation of the defendants' fourth amendment "right to be let alone." This case differs from those on the physical facts because here the police officer watched and listened through the rear window of the first floor apartment while standing on public property, a C.T.A. right-of-way where he had a right to be, rather than trespassing on defendants' property; and the absence of a trespass under our reading of *Harris* is of major if not decisive importance in cases involving the plain-view doctrine. We need not make the resolution of this appeal turn on the absence of a trespass by Officer Waller, however, because the *Brock-Hurst-Gonzales* cases do not hold that officers can never acquire probable cause to arrest by looking in windows of private residences, "but only that they must have probable cause to think that a crime is being committed before they do so." (388 F. 2d at 148.) It is clear that when Officer Waller peered through the rear window in question, he had ample cause to believe that a policy operation was being conducted on the premises. The officer knew that by issuing a search warrant for the second floor apartment of the two-story structure at 1702 North Bissell a court had found there was sufficient cause to believe that a policy operation was being carried on in the building. Furthermore, he had been informed that those individuals involved in the gambling activity would not arrive at the apartment until 10:00 or 10:30 P.M., and when he observed persons known to him as policy runners whom he had arrested on many prior occasions enter the first floor apartment at about 10 o'clock that evening we

hold that he had probable cause to believe that the policy operation was being conducted in that apartment on that particular night. (See *Davis* v. *State,* 166 Tex. Cr. 480, 316 S. W. 2d 745.) Therefore the evidence which was seized incident to the arrest of the defendants was properly admitted.

The judgment of the Cook County circuit court is accordingly affirmed.

Judgment Affirmed.

Mr. JUSTICE WARD took no part in the consideration or decision of this case.

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Petitioners,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(On Petition for Writ of Certiorari To The Illinois Supreme Court)

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Illinois Supreme Court is reported at 41 Ill. 2d 170, 242 N.E. 2d 180 (1968).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED FOR REVIEW

Whether a police officer who observes a crime being committed in his presence has probable cause to make an arrest without a warrant?

Whether the "plain view" doctrine has continuing vitality?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to The Constitution of The United States.

STATUTE INVOLVED

Illinois Revised Statutes, Chapter 38, Section 121-3 (1965).

STATEMENT OF THE CASE

On May 12, 1966 the petitioners were convicted of Gambling, a violation of *Illinois Revised Statutes*, Ch. 38, sec. 28-1 (1965). The sole witness for the state, both at the hearing on the Motion to Suppress and at trial, was officer Herman Waller, a Chicago policeman. He testified at the hearing on the Motion to Suppress that on November 24, 1965, he had occasion to get a search warrant for a second floor apartment in Chicago. A part of the original information given him regarding a policy operation at that address included the names of people who were engaged in this activity.

Officer Waller obtained the warrant at 7:00 P.M. on that night. He and several other police officers went to

the premises in question and arrived at about 9:30 P. M. Upon arrival he set up a surveillance of the premises because he knew that no one would be in the apartment until 10:00 or 10:30 P. M. During the time that the officers observed the building (about 35 minutes), people officer Waller knew to be engaged in policy operations did in fact enter the building. Officer Waller knew that these individuals worked in policy because he had previously arrested some of them on policy charges and because of the specific information he had received about policy operations at the address in question.

The individuals recognized by the witness went, not to the second floor apartment as they had done in the past, but to the first floor apartment. After seeing this, Officer Waller went to the rear of the premises. Because this building did not have a backyard, he was able to stand under the elevated tracks on the Chicago Transit Authority right-of-way and look through the window of the first floor apartment. He was standing one to three feet from the window the sill of which was waist level. The window was closed at the time but there was no storm window. According to the witness' testimony he could see the heads of the people in the room and he heard a female voice saying, "are all your books in", "who has any short books", and "where is all the money?" In addition he heard the operation of an adding machine.

From his experience gained in three to four hundred policy arrests, Officer Waller knew that "short books" means that a "runner" is short on money, that he hasn't obtained enough cash to clear his bets on that book. Also, he testified that adding machines are used in policy operations to tally the sums that are collected daily on each book.

At this point the witness alerted his men that he was going to make an entry. He went to the front door and knocked, whereupon a male known as Thomas Jefferson came to the door pulled back the curtain, and asked, "Who is it?" The witness announced his office, but Jefferson told him to "get lost". Officer Waller then forced the door open and entered into the first floor apartment. The search warrant for the second floor apartment was never executed and was later quashed.

On the basis of this testimony the Motion to Suppress was denied. It was concluded that the police officer had reasonable grounds to believe that an offense had been committed in the first floor apartment because of what he had seen and heard and that the entry into the premises for the purpose of making an arrest was, therefore, legal.

REASONS FOR DENYING THE WRIT

I.

The Instant Search Was Incident To A Valid Arrest Based On Probable Cause And Was Consistent With The Decisions Of This Court.

The petitioners contend that the evidence obtained incident to their arrest should have been suppressed because the conduct of the police violated the Fourth Amendment as interpreted by this Court. They argue that the resolution of this issue by the Illinois Supreme Court conflicts with particular decisions of this Court. However, putting these cases into their proper context it is clear that the Illinois Supreme Court properly applied the law.

Viewing the conduct of Officer Waller step-by-step, the Illinois Supreme Court made the following relevant findings:

a) His looking through the window did not constitute an unreasonable search.

b) From what he observed and what he knew from prior experience he had probable cause to make an arrest without a warrant.

c) His announced entry was proper police conduct.

d) And finally, the arrest he made being valid, the search and seizure was justified without the necessity of first obtaining a warrant.

It is apparent that the gravamen of the petition is that it was improper for Officer Waller to take his position on the property of the Chicago Transit Authority and look into the window of the petitioners' apartment. The Illinois Court was following a rule well established by this Court and others that to observe what is in plain view is not a search. *United States* v. *Lee,* 274 U.S. 559 (1926); *Fullbright* v. *United States,* 392 F. 2d 432 (10th Cir. 1968); *Edwards* v. *State,* 156 N.W. 2d 397 (Wisc. 1968); *Penna* v. *State,* 241 A. 2d 385 (Conn. 1967); *Minnick* v. *State,* 241 A. 2d 153 (Md. App. 1968). And, as the court observed, this doctrine is not limited to what is seen. It has been applied to the five senses. *Walker* v. *State,* 270 P. 2d 1107 (Okla. Crim. App. 1954).

The Illinois Supreme Court quoted *Harris* v. *United States,* 390 U.S. 234 (1968) as reaffirming the "plain view" doctrine. In point of time *Harris* follows *Katz* v. *United States,* 389 U.S. 347 (1967), where this Court was careful to point out that the "Fourth Amendment protects people not places. What a person knowingly exposes to

the public even in his own home or office is not a subject of fourth amendment protection." 389 U.S. at 351.

The petitioners object to the manner in which the Illinois Court distinguished *Katz*. However, the difference between the conduct of Officer Waller and the use of electronic eavesdropping devices is a distinction which goes to the very heart of the *Katz* decision and hardly needs comment. In its opinion the Illinois Supreme Court reconciled *Harris* and *Katz* in the following way:

> We read the reaffirmation of the lawful position aspect of the plain-view doctrine in *Harris* as retaining the viability of the trespass doctrine in those cases where law enforcement officers gain information concerning crimes by use of their natural senses. Therefore, while the absence of a trespass is no longer to be an adequate ground to justify the admission of evidence secured through use of the natural senses assisted by artificial means, the lack of a trespass is still a highly relevant consideration in sustaining the admission of evidence which has fallen into the plain view of an officer, i.e., gathered solely by the use of his natural senses.
>
> We have here a law enforcement officer using his senses of vision and hearing to discover what is occurring inside a private residence. In three Federal cases (Brock v. United States (5th Cir.), 223 F. 2d 681; California v. Hurst (9th Cir.), 325 F.2d 891; Texas v. Gonzales (5th Cir.), 388 F.2d 145) it was held that evidence procured by officers standing on the *defendants' premises* and peering into their windows constituted a search in violation of the defendants' fourth amendment "right to be let alone." This differs from those on the physical facts because here the police officer watched and listened through the rear window of the first floor apartment while standing on public property, a C.T.A. right-of-way where he had a right to be, rather than trespassing on defendants'

> property; and the absence of a trespass under our reading of *Harris* is of major if not decisive importance in cases involving the plain-view doctrine. 242 N.E. 2d at 183-184

Another point of departure between *Katz* and the instant case is that what Officer Waller heard was not introduced into evidence. It was used only to establish probable cause and not as evidence in the case in chief. Officer Waller having heard the conversation going on between the suspects, knowing what they were doing and talking about by reason of his experience as a police officer, decided to make his entry and effect an arrest. It is clear that according to standards laid down by this Court Officer Waller had probable cause:

> In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.
>
> "The substance of all the definitions" of probable cause "is a reasonable ground for belief of guilt." *McCarthy* v. *De Armit,* 99 Pa. St. 63, 69, quoted with approval in the *Carroll* opinion. 267 U.S. at 161. And this "means less than evidence which would justify condemnation" or conviction, as Marshall, C. J., said for the Court more than a century ago in *Locke* v. *United States,* 7 Cranch 339, 348. Since Marshall's time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where "the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. *Carroll* v. *United States,* 267 U. S. 132, 162.

> These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.
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> *Brinegar* v. *United States,* 338 U.S. 160 at 175-176.

See also: *Draper* v. *United States,* 358 U.S. 307 (1959); *Miller* v. *United States,* 357 U.S. 301 (1958).

The petitioner contends that the circumstances were not exigent. However nothing could be further from the truth. It was late at night and the suspects were finishing their illegal work for the day. They were not going to remain around the premises much longer and, as this court observed in *Schmerber* v. *California,* 384 U.S. 757 (1966):

> "Although the facts . . . established probable cause to arrest in this case . . ., the question remains whether the arresting officer was permitted to draw these inferences himself, or was required instead to procure a warrant before proceeding with the test. . . . The officer in the present case . . . might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of

> evidence', *Preston* v. *United States,* 376 U.S. 364, 367."
>
> 384 U.S. at 770.

The principle reaffirmed in *Schmerber* is beyond dispute. It has been applied repeatedly by this Court and courts of the several states. *Henry* v. *United States,* 361 U.S. 98 (1959); *Draper* v. *United States,* 358 U.S. 307 (1959); *Rabinowitz* v. *United States,* 339 U.S. 56 (1947); *Lee* v. *United States,* 363 F. 2d 469 (8th Cir. 1966); *United States* v. *McMillan,* 368 F. 2d 810 (2nd Cir. 1966); *Rocha* v. *United States,* 387 F. 2d 1019 (9th Cir. 1967); *United States* v. *Clark,* 289 F. Supp. 610 (E.D.Pa. 1968).

Thus, having probable cause and there being sound reason for not first obtaining a search warrant, Officer Waller made his move to enter the building. A comparison of *Ker* v. *California,* 374 U.S. 23 (1962), with the case at bar demonstrates the propriety of this conduct. In *Ker* this Court noted:

> The *evidence at issue, in order to be admissible, must* be the *product of a search incident to a lawful arrest, since* the *officers had no search warrant.* The lawfulness of the arrest without warrant, in turn, must be based upon probable cause, which exists "where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar* v. *United States,* 338 U.S. 160, 175-176 (1949), quoting from *Carroll* v. *United States,* 267 U.S. 132, 162 (1925); accord, *People* v. *Fischer,* 49 Cal. 2d 442, 317 P. 2d 967 (1957); *Bompensiero* v. *Superior Court,* 44 Cal. 2d 178, 281 P. 2d 250 (1955).
>
> 374 U.S. at 34-35.

In the instant case the probable cause was based on much stronger evidence than that present in *Ker*. Here officer Waller had the rare opportunity of viewing and hearing the suspects in the furtherance of the crime. The police in *Ker* lacked this opportunity. Waller was not, as the petitioners suggest, relying on mere suspicion; thus, there was no transgression of the guidelines recently defined in *Spinelli* v. *United States,* —— U.S. ——, 4 Cr.L. Rptr. 3083 (1969).

The petitioners contend that this analysis conflicts with *Johnson* v. *United States,* 333 U.S. 10 (1947); *McDonald* v. *United States,* 335 U.S. 451 (1948); and *Chapman* v. *United States,* 365 U.S. 610 (1955). Petitioners argue that the holdings in these cases would have required the police to first obtain a warrant. However, in arriving at this conclusion petitioners fail to give proper consideration to *Trupiano* v. *United States,* 334 U.S. 699 (1948); *Rabinowitz* v. *United States,* 339 U.S. 56 (1947); and *Ker* v. *California,* 374 U.S. 23 (1962).

In point of time the first of these decisions was *Johnson.* It was specifically followed in *Trupiano. McDonald* followed and relied on both *Johnson* and *Trupiano.* If it were not for *Rabinowitz* there might be conflict between the holding of the Illinois Supreme Court and these cases. However, in *Rabinowitz* this Court made the following observation:

> "To the extent the *Trupiano* requires a search warrant solely upon the basis of the practicality of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled." 339 U.S. at 66.

It follows logically, then, that since *Trupiano* followed *Johnson,* and *McDonald* specifically relied on both, they

have all been overruled to the same extent by *Rabinowitz.* Thus, there is no confusion or conflict in the holdings.

The petitioner makes the observation that *Johnson* was followed in *Chapman* v. *United States,* 365 U.S. 610 (1955), which was decided after *Rabinowitz.* However, *Ker* v. *California,* 374 U.S. 23, 35, specifically followed *Rabinowitz;* and that negates the influence of *Johnson* and *Chapman* insofar as a warrantless search incident to an arrest is concerned. See *Ker* v. *California,* 374 U.S. at 42-43, n. 13 & 14. Furthermore, in *Ker* this Court specifically distinguished *Chapman* on its facts from a situation like the one at bar. In *Chapman* the police entered a home without a warrant because they smelled burning opium emanating from the room. But in that case there was no question of a search incident to an arrest. The defendant was not even home when the police entered his house with the landlord's permission. This Court in *Ker* made the observation that:

> In cases in which a search could not be regarded as incident to arrest because the petitioner was not present at the time of the entry and search, the absence of compelling circumstances, such as the threat of destruction of evidence, supported the Court's holdings that searches without warrants were unconstitutional. See *Chapman* v. *United States,* 365 U. S. 610, 615 (1961); *United States* v. *Jeffers* 342 U.S. 48, 52 (1951); *Taylor* v. *United States,* 286 U.S. 1, 5 (1932). 374 U.S. at 42, n. 13.

Thus, the apparent conflict results from petitioners' failure to consider all the relevant cases on the issue they have raised.

II.

A Brief Delay In The Execution Of A Search Warrant Does Not Vitiate The Subsequent Search And Seizure.

The petitioners complain that there was approximately a three hour delay between the time the search warrant was obtained and the time it was abandoned. They contend that this conduct by the police vitiated the subsequent arrest and search.

The search warrant was issued in compliance with Illinois Revised Statute, Chapter 38, sec. 108-6 (1967). According to this statute the police had 96 hours to execute the warrant. It is worth noting that this provision follows the language of the Federal Criminal Rule 41(d) which, significantly, provides for a ten day period in which to execute a warrant.

Be that as it may, there was good reason for officer Waller not executing the search warrant immediately. He knew that no one would be in the apartment until 10:00 or 10:30 P.M. His actions were nothing less than good police work.

The petitioners assert that the Illinois Supreme Court did not concern itself with the fact that the search warrant was not executed and that the surveillance of the premises resulted in probable cause for an arrest. They apparently overlooked that portion of the Court's opinion which stated:

> "It is of no consequence that the search warrant obtained by police was quashed because it authorized a search only of the second floor apartment of the two-story building, since defects in a search warrant are immaterial if the search can be otherwise justified." 242 N.E. 2d at 182.

Here, as demonstrated above, the search was justified as being incident to a lawful arrest. Defects in an existing warrant or, for that matter, absence of a warrant altogether, under the circumstances presented here, are irrelevant factors. *Ford* v. *United States,* 352 F. 2d 927 (D.C.Cir. 1966); *United States* v. *Hall,* 348 F. 2d 837 (2nd Cir. 1965); *Ferganchick* v. *United States,* 374 F. 2d 559 (9th Cir. 1967); *State* v. *Allen,* 232 A. 2d 315 (Pa. 1967); *People* v. *Chimel,* 61 Cal. Rptr. 714 (Cal App. 1967).

The petitioner's reliance on *Bumper* v. *North Carolina,* 391 U.S. 548 (1968), is misplaced. The search here was neither conducted in reliance on an invalid warrant nor on the basis of coerced consent.

CONCLUSION

For the foregoing reasons it is respectfully requested that the Petition for Writ of Certiorari to The Illinois Supreme Court be denied.

Respectfully submitted,

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